SERVED: July 29, 1996

NTSB Order No. EA-4474

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 29th day of July, 1996

DAVID R. HINSON, Administrator, Federal Aviation Administration, Complainant, v. JOSE J. BASULTO, Respondent.	)	Docket SE-14512

OPINION AND ORDER

The Administrator and the respondent have both appealed from the oral initial decision Administrative Law Judge William A. Pope rendered in this proceeding on July 5, 1996, at the conclusion of an eight-day evidentiary hearing.[1] By that decision, the law judge concluded that respondent had, as alleged

[1]An excerpt from the hearing transcript containing the initial decision is attached.

by the Administrator in his May 16, 1996 Emergency Order of Revocation, violated sections 91.703(a)(2) and (3) and 91.13(a) of the Federal Aviation Regulations, "FAR," 14 CFR Part 91, by making two unauthorized flights within the territorial airspace of the Republic of Cuba.[2] The law judge further concluded, however, that a 150-day suspension of any and all of respondent's airman certificates, including his commercial pilot certificate (No. 002122405), rather than revocation, should be imposed for the violations.

On appeal, the respondent challenges rulings by the law

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[2]FAR sections 91.703(a)(2) and (3) and 91.13(a) provide as follows:

> § 91.703 **Operations of civil aircraft of U.S. registry outside of the United States.**
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> (a) Each person operating a civil aircraft of U.S. registry outside of the United States shall--
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> * * * * *
>
> (2) When within a foreign country comply with the regulations relating to the flight and maneuver of aircraft there in force;
>
> (3) Except for §§ 91.307(b), 91.309, 91.323, and 91.711, comply with this part so far as it is not inconsistent with applicable regulations of the foreign country where the aircraft is operated or annex 2 of the Convention on International Civil Aviation....
>
> § 91.13 **Careless or reckless operation.**
>
> (a) *Aircraft operations for the purpose of air navigation.* No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

The Emergency Order of Revocation, which served as the complaint in this proceeding, alleged that respondent's flights within Cuban airspace had contravened various laws of the Republic of Cuba. A copy of the complaint is attached.

judge on discovery with respect to one of the two flights and his decision on sanction as to the other flight. The Administrator also objects to certain discovery determinations and argues, as well, that the law judge erred in not sustaining revocation. For the reasons discussed below, we find merit only in the Administrator's appeal on sanction.[3]

Respondent is the president of a group called "Brothers to the Rescue" (BTTR), an organization whose purpose is to help Cuban nationals in their efforts to leave Cuba by sailing in various watercraft across the Straits of Florida to the United States. BTTR conducts aircraft patrols to spot refugees so that their location can be relayed to the U.S. Coast Guard for its assistance in transporting them to safety. See Transcript at 1517. The first of the two flights at issue in this proceeding, as the initial decision explains at length, which occurred on July 13, 1995, did not involve a search and rescue operation, but was, rather, part of a flotilla of vessels and aircraft in the Straits of Florida to protest certain prior actions against fleeing refugees by the Government of Cuba. The second flight, on February 24, 1996, was supposed to be a routine BTTR search

[3]Respondent's motion to dismiss the Administrator's appeal as untimely is denied. As we have previously indicated, where the two-day time limit for filing an appeal in an emergency case expires on a Saturday, Sunday, or Board holiday, the deadline is automatically extended to the next business day. See, e.g., Administrator v. Carroll, 6 NTSB 1170, 1171 (1989) and Administrator v. Carter, NTSB Order No. EA-3730 at p. 3, n. 4 (1992). Thus, the notice of appeal from the Friday, July 5 initial decision that the Administrator filed on Monday, July 8, was timely.

operation, outside the 12-mile territorial limit of Cuban airspace.

The respondent did not contest the allegations that he had operated a civil aircraft, N2506, a Cessna 337, into Cuban airspace and over Havana, Cuba, on July 13, 1995. The law judge found that that operation involved deliberate violations of the cited FARs and was contrary to FAA admonitions, given only days earlier, that such incursions, aside from involving the risk of hostile Cuban reaction, would be subject to prosecution. As to the flight on February 24, 1996, also made in N2506, respondent, who conceded knowledge, by that date, of warnings of the dire consequences that further incursions into Cuban airspace might engender,[4] disputed that he had penetrated Cuban airspace, but testified that if he had, it was inadvertent. The law judge credited that account, and determined, as more fully discussed hereafter, that a 30-day suspension for the violations associated with the February 24 flight was appropriate.

Respondent argues on appeal that the law judge erred by not punishing the Administrator for his noncompliance with a discovery order that required him to provide U.S. Air Force radar data pertinent to the February 24 flight no later than June 19, 1996. He asserts that he was actually prejudiced because the information, which the law judge relied on in determining that

[4]In fact, two BTTR aircraft accompanying respondent on the February 24 mission were shot down by Cuban MiG aircraft, with loss of life of those aboard, in the vicinity of the 12-mile Cuban territorial limit. Respondent's escape from the same fate appears to have been fortuitous.

the respondent did, as alleged, enter Cuban airspace, was not given to him, for review by his expert witness, until June 21, only five days before the hearing. We find no abuse of discretion by the law judge in refusing to sanction the Administrator, with a preclusion order or otherwise, for the delay. Apart from the fact that no reason appears for disbelieving the Administrator's counsel's assertion that he furnished the radar data to respondent on the same day he received it from the Air Force, respondent has identified no basis for finding that the 2-day delay prejudiced him in any cognizable way; that is, that the delay, albeit undesirable and inconvenient insofar as respondent's overall defense preparations were concerned, actually kept respondent from reviewing the evidence to the degree necessary to effectively respond to it at the hearing.[5] It is not sufficient, in this regard, for respondent to complain that more time might have enabled him to explore other bases for challenging the probative value of the Air Force radar data. The issue is whether respondent had enough time, within the constraints of an emergency proceeding whose accelerated deadlines he chose not to waive, to understand the nature and substance of the evidence the Administrator intended to introduce in support of his charges. He has not shown that he

[5]In this connection we note that respondent's radar expert appeared to be fully prepared to voice his views as to the strengths and weaknesses of the radar data both the Air Force and the U.S. Customs Service had recorded with regard to the February 24 flight.

did not.[6]

Respondent next contends that the law judge erred by not issuing an order precluding the Administrator from introducing any evidence at the hearing as to the location of respondent's aircraft on February 24 because the Administrator had not produced, in advance of the hearing, a copy of the four track tape recording that the U.S. National Security Agency (NSA) had of communications on that date between the Cuban MiGs and Cuban ground controllers. Respondent submits in effect that even though he had been given a tape of two tracks of the recording the NSA had of the transmissions, the Administrator's failure to provide him with the four-track tape until the hearing was underway deprived him of an adequate opportunity to analyze the tape and determine whether it contained any exculpatory information, such as some transmission supportive of respondent's position that he and his fellow BTTR pilots had stayed outside of Cuban airspace. Assuming, arguendo, that the law judge could properly sanction the Administrator for the NSA's refusal to produce, or tardiness in producing, evidence in response to respondent's discovery request for the tape, we find no error in

[6]Similarly, the fact that respondent did not have more than a day and a half before the hearing to depose the Air Force technician who was brought in to sponsor the radar data does not establish that more time was necessary to prepare for his testimony as to what the data showed and on the reliability of the radar equipment that recorded it. Again, the issue is not whether additional time could have enabled respondent to develop evidence that might contradict or undermine the technician's testimony, but whether respondent had sufficient notice of the technician's opinions about the data and equipment to test his knowledge on those subjects through cross examination.

the law judge's refusal to do so.[7] The NSA recordings were not part of the evidence the Administrator intended to use in his case against the respondent, who had in advance of hearing been furnished a copy of a tape believed to have the transmissions relevant to his request. As no showing was made that the respondent did not obtain the four-track version in time to ascertain whether his suspicion that that tape, unlike the earlier one he had received, might be helpful to his defense was justified, we see no reason to disturb the law judge's conclusion that the Administrator had substantially complied with the discovery request and, therefore, should not be limited in the presentation of his case.

On the issue of sanction, the law judge, as noted, supra, determined that a 150-day suspension for the two breaches of Cuban airspace should be imposed. First, he ruled, correctly observing that "[g]ood motives do not excuse deliberate FAR violations" (Tr. at 1889), that a 120-day suspension of respondent's airman certificate was appropriate for the intentional violation of regulations that the July 13, 1995

[7]Since the law judge did not in fact sanction the Administrator for delays in responding to respondent's discovery request that were attributable to the NSA, we decline to rule on the scope of his authority to have done so. We also decline to decide the propriety of the law judge's discovery orders concerning information within the custody or control of individuals in the U.S. Department of State. At the same time, however, we are constrained to note that the relevancy of some information the law judge ordered the State Department to produce is far from self-evident.

flight reflected.[8] As to the February 24, 1996 flight, the law judge found respondent's violations to have been inadvertent. He likened the incursion into Cuban airspace to an unauthorized operation within a U.S. restricted or prohibited area, and, noting that the Administrator's Sanction Guidance Table[9] contemplates a suspension of from 30 to 90 days for such operations, imposed a 30-day suspension.[10] We concur in the Administrator's contention that the law judge committed gross error in his decision on sanction in this matter by, among other things, engaging in a "compartmentalized analysis [that] distort[ed] the complaint and minimize[d] the significance of the totality of circumstances that supported revocation." Adm. App. Br. at 10.

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[8]Respondent's view that that flight should have drawn no more than a 30 to 90 day suspension under the FAA's sanction guidelines directed at unauthorized operations in prohibited, restricted or certain controlled airspace (such as what used to be called a terminal control area around an airport) does not take into account the increase in sanction justified, under the guidelines, by a purposeful disregard of regulations.

[9]See FAA Order 2150.3A, Appendix 4.

[10]The law judge appears to have set the sanction for the February flight at the low end of the range for the type of violation he believed it most closely resembled because the respondent, in the law judge's opinion, could reasonably have discounted the likelihood that Cuba would follow through on its threat to force down or shoot down aircraft violating its airspace. We question such reasoning, for whether or not respondent actually believed that the Government of Cuba would do what it said it would do, he, at the very least, chose to fly perilously close to an area he had been repeatedly warned to avoid, given the possible, and potentially fatal, hazard *any* entry presented. If an "unintentional" entry in these circumstances justifies only a 30-day suspension, it is difficult to envision an unknowing incursion that would support a 90-day suspension.

As a starting point, we should register our view that the Administrator complicated the sanction issue by proposing, before the February flight occurred, that respondent's certificate only be suspended for 120-days, rather than revoked. The July incident did not simply involve a deliberate violation of regulations. It involved a violation the respondent had only days earlier advised an FAA inspector might occur if the FARs stood in the way of respondent's "doing his job" as the leader of BTTR. While every deliberate FAR violation raises an issue as to whether the airman can be trusted to conform his conduct to applicable laws, respondent, prior to the July flight, essentially advised the Administrator that he could not be. Nevertheless, the Administrator, despite the evidence, by word and deed, that respondent lacked the care, judgment, and responsibility necessary to obey regulations that might conflict with his BTTR activities, did not seek revocation. Even though the Administrator's proposal on sanction regarding the July flight may have been lenient, the law judge should have undertaken to determine not what sanction each flight separately might warrant, but what sanction was justified by the repetitive violation of the same FARs. As he failed to undertake such an assessment, clearly compelled by the circumstances, we do so now.

Given the deliberate nature of respondent's July airspace violation, and his prior advice that he would, in effect, ignore the Cuban territorial limit whenever he believed it necessary to do so to advance the BTTR agenda, the fact that he may not have

intended to penetrate Cuban airspace during the February flight is subsumed by the fact that, notwithstanding pending charges for a similar violation and being fully informed as to subsequent announcements articulating the enhanced risks further incursions posed, he knowingly flew so near the limit that whether he actually crossed it became a matter of happenstance, reflecting his ongoing disinclination to accept, as a limitation on his rights as an airman, the prohibition against entering Cuban airspace without permission. Viewed in this way, we think the February flight must be seen as a further indication that the respondent, consistent with his previous conduct and advice, lacks the compliance disposition the Administrator reasonably demands of all certificate holders.[11] Revocation of the airman certificates of such individuals is, as the Administrator maintains, the only appropriate sanction.

[11]We are also of the view that the respondent's operation of the February flight in the circumstances described was reckless, within the meaning of FAR section 91.13(a). In this connection we note that at a position where respondent says he thought he was near, but outside, the 12-mile limit, he gave the controls over to a pilot passenger, while respondent filmed the Cuban coastline. In light of the warnings, whether believed by respondent or not, of the consequences that might attend crossing the territorial limit, a prudent pilot would have, we think, exercised extreme care to avoid an unintended incursion.

ACCORDINGLY, IT IS ORDERED THAT:

1. The respondent's appeal is denied;

2. The Administrator's appeal is granted in part;

3. The initial decision is reversed to the extent it modified the sanction in the Emergency Order of Revocation; and

4. The Emergency Order of Revocation is affirmed.

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.